



## **DEPARTMENT OF AGRICULTURE**

### **Rural Utilities Service**

#### **7 CFR Part 1787**

#### **RIN 0572-AC42**

#### **“Buy American” Requirement**

**AGENCY:** Rural Utilities Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Rural Utilities Service (RUS), a Rural Development Agency of the United States Department of Agriculture (USDA), hereinafter referred to as RUS or the Agency, is issuing a final rule to amend its regulations to address its “Buy American” requirement. This will codify long-standing RUS requirements which Agency borrowers have been required to follow pursuant to statute, bulletin, and contract as early as the 1950s. RUS will rescind Bulletin 43-9:344-3, “Buy American’ Requirement,” when this regulation becomes effective.

**DATES:** This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Norris Nicholson, Electric Program, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Ave. SW, Washington, DC 20250, Email: [Norris.Nicholson@wdc.usda.gov](mailto:Norris.Nicholson@wdc.usda.gov); telephone number: (202) 720-1979.

Kenneth Kuchno, Telecommunications Program, Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Ave. SW, Washington, DC 20250, email: [Kenneth.Kuchno@wdc.usda.gov](mailto:Kenneth.Kuchno@wdc.usda.gov), phone number: 202-720-9424.

#### **SUPPLEMENTARY INFORMATION:**

##### **Executive Order 12372, Intergovernmental Consultation**

This final rule is excluded from the scope of Executive Order 12372, Intergovernmental Consultation, which may require consultation with State and local officials. A Notice of Final Rule titled Department Programs and Activities Excluded from Executive Order 12372 (50 FR 47034) exempts RUS loans and loan guarantees to governmental and nongovernmental entities from coverage under this Order.

##### **Executive Order 12866, Regulatory Planning and Review**

This final rule has been determined to be not significant for the purposes of Executive Order 12866, Regulatory Planning and Review, and therefore has not been reviewed by the Office of Management and Budget (OMB).

##### **Executive Order 12988, Civil Justice Reform**

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. RUS has determined that this final rule meets the applicable standards provided in section 3 of the Executive Order. In addition, all State and local laws and regulations that are in conflict with this rule will be preempted, no retroactive effort will be given to this rule, and, in accordance with Sec. 212(e) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. Sec. 6912(e)), administrative appeal procedures, if any, must be exhausted before an action against the Department or its agencies may be initiated.

#### **Executive Order 13175, Consultation and Coordination with Indian Tribal**

##### **Governments**

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Executive Order 13175 requires Federal agencies to consult and coordinate with tribes on a government-to-government basis on policies that have tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes or on the distribution of power and responsibilities between the Federal Government and Indian tribes. The policies contained in this final rule do not have Tribal implications that preempt Tribal law. The Agency will continue to work directly with Tribes and Tribal applicants to improve access to Agency programs. This includes providing focused outreach to Tribes regarding implementation of this rule change. Additionally, the Agency will respond in a timely and meaningful manner to all Tribal government requests for consultation concerning this rule. For further

information on the Agency's Tribal consultation efforts, please contact Rural Development's Native American Coordinator at (720) 544-2911 or [AIAN@wdc.usda.gov](mailto:AIAN@wdc.usda.gov).

### **Regulatory Flexibility Act Certification**

The Agency has determined that this final rule will not have a significant economic impact on a substantial number of small entities, as defined in the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), given that the amendment is only an administrative act on the government's part to codify a statute with respect to obligation of funds.

### **Information Collection and Recordkeeping Requirements**

In accordance with the Paperwork Reduction Act, the paperwork burden associated with this final rule has been approved by the Office of Management and Budget (OMB) under the currently approved OMB Control Numbers 0572-0107. The Agency has determined that this regulatory action does not change any current data collection that would require approval under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

### **Catalog of Federal Domestic Assistance**

The programs described by this rule are listed in the Catalog of Federal Domestic Assistance programs under No. 10.850, Rural Electrification Loans and Loan Guarantees; No. 10.851, Rural Telephone Loans and Loan Guarantees; and No. 10.852, Rural Telephone Bank Loans and No. 10.886, Rural Broadband Access Loans and Loan Guarantees. All active CFDA programs can be found at [www.cfda.gov](http://www.cfda.gov). The Catalog is available on the Internet at <http://www.cfda.gov> and the General Services Administration's (GSA's) free CFDA Web site at <http://www.cfda.gov>.

The CFDA Web site also contains a PDF file version of the Catalog that, when printed, has the same layout as the printed document that the Government Publishing Office (GPO) provides. GPO prints and sells the CFDA to interested buyers. For information about purchasing the Catalog of Federal Domestic Assistance from GPO, call the Superintendent of Documents at 202-512-1800 or toll free at 866-512-1800, or access GPO's online bookstore at <http://bookstore.gpo.gov>.

### **Unfunded Mandate**

This final rule contains no Federal mandates (under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995) for state, local, and tribal governments or the private sector. Therefore, this final rule is not subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act of 1995.

### **National Environmental Policy Act Certification**

The Administrator of RUS has determined that this final rule will not significantly affect the quality of the human environment as defined by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). Therefore, this action does not require an environmental impact statement or assessment.

### **E-Government Act Compliance**

The Agency is committed to the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

## **USDA Non-Discrimination Policy**

In accordance with Federal civil rights law and U.S. Department of Agriculture (USDA) civil rights regulations and policies, the USDA, its Agencies, offices, and employees, and institutions participating in or administering USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs).

Remedies and complaint filing deadlines vary by program or incident.

Persons with disabilities who require alternative means of communication for program information (e.g., Braille, large print, audiotape, American Sign Language, etc.) should contact the responsible Agency or USDA's TARGET Center at (202) 720-2600 (voice and TTY) or contact USDA through the Federal Relay Service at (800) 877-8339. Additionally, program information may be made available in languages other than English.

To file a program discrimination complaint, complete the USDA Program Discrimination Complaint Form, AD-3027, found online at [http://www.ascr.usda.gov/complaint\\_filing\\_cust.html](http://www.ascr.usda.gov/complaint_filing_cust.html) and at any USDA office or write a letter addressed to USDA and provide in the letter all of the information requested in the form. To request a copy of the complaint form, call (866) 632-9992. Submit your completed form or letter to USDA by: (1) Mail: U.S. Department of Agriculture, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue, SW, Washington, D.C. 20250-9410; (2) fax: (202) 690-7442; or (3) email: [program.intake@usda.gov](mailto:program.intake@usda.gov).

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## **Background**

The Rural Electrification Act requires that in making loans pursuant to the Rural Electrification Act of 1936, the Secretary of Agriculture shall require that, to the extent practicable and the cost of which is not unreasonable, the borrower agrees to use in connection with the expenditure of such funds only such unmanufactured articles, materials, and supplies, as have been mined or produced in the United States or in any eligible country, and only such manufactured articles, materials, and supplies as have been manufactured in the United States or in any eligible country, substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States or any eligible country. This regulation will codify long-standing RUS requirements which Agency borrowers have been required to follow pursuant to statute, bulletin, and contract as early as the 1950s, but which were inadvertently never codified when all existing RUS bulletins were incorporated into regulation. Nothing in this regulation will change or modify those procedures with respect to borrowers' responsibilities in complying with the Buy American requirement, such as the waiver process, but will simplify compliance by compiling all such existing requirements into a single document.

## **List of Subjects in 7 CFR Part 1787**

Communications equipment, Electric power, Loan programs-communications, Loan programs-energy, Reporting and recordkeeping requirements, Rural areas, Telephone.

For the reasons set out in the preamble, RUS amends 7 CFR chapter XVII by adding part 1787 to read as follows:

**PART 1787 – THE “BUY AMERICAN” REQUIREMENT**

Sec.

1787.1 General.

1787.2 Definitions.

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1787.4 Unmanufactured articles, materials, and supplies.

1787.5 Eligible countries.

1787.6 Nondomestic products.

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1787.10 Application for specific waivers.

1787.11 Cost differential.

1787.12 Non-availability or shortages.

1787.13 Public interest or impracticality.

1787.14 General waivers.

Appendix A to Part 1787 – Product Procurement

**Authority:** 7 U.S.C. 903.



#### § 1787.1 General.

(a) The “Buy American” provision of the Rural Electrification Act of 1936 (RE Act) requires, to the extent practicable and the cost of which is not unreasonable, that RUS Borrowers use loan funds only for such manufactured articles, materials, and supplies as have been manufactured in the United States or in any eligible country, substantially all from articles, materials, or supplies mined, produced or manufactured, as the case may be, in the United States or any eligible country.

(b) Each RUS Borrower is responsible for assuring that its use of loan funds complies with this requirement, and that the contracts it enters into for construction, materials and equipment, and purchases with vendors contain the Buy American requirement, along with certification as to compliance, made through RUS Form 213.

#### § 1787.2 Definitions.

For purpose of this part, the following terms have the following meanings:

Administrator. The Administrator of the RUS, or his/her designee.

Buy American. A provision of the RE Act requiring that loan funds only be used to purchase products made in the U.S. or an eligible country.

Component. Any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the end product at the final assembly location.

Domestic product. A product or like product which both:

(1) Is manufactured in the United States or in any eligible country; and

(2) Contains components manufactured in the United States or in any eligible country consisting of more than 50 percent of the total cost of all components used in the product.

Eligible country. Any country that the United States Trade Representative determines as having corporations located therein, as eligible to enter into contract with an RUS Borrower, under which loan funds will be provided for unmanufactured and manufactured goods.

Loan funds. Funds provided under an RUS direct or guaranteed loan.

Manufactured. The application of processes to alter the form or function of materials or of elements of the product such that value is added or the materials or elements are transformed into a new end product functionally different from that which would result from mere assembly of the materials or elements.

Nondomestic bid. An offer to sell a nondomestic product to an RUS borrower.

Nondomestic product. Any product other than a domestic product or product from an eligible country.

Product. An item of manufactured material or assembled components, which is complete and capable of performing an intended practical purpose.

RE Act. Rural Electrification Act of 1936, as amended (7 U.S.C. 901 et seq.).

RUS. The Rural Utilities Service.

RUS Borrower. Any organization that has an outstanding RUS loan made or guaranteed by RUS pursuant to the RE Act.

Telecommunications. Any communication service for the transmission or reception of voice, data, sounds, signals, pictures, writings, or signs of all kinds, by wire, fiber, radio, light, or other visual or electromagnetic means, including all telephone lines, facilities, or systems used in the rendition of such service; but shall not be deemed to mean message telegram service or

community antenna television system services or broadcasting facilities other than those intended exclusively for educational purposes, or radio broadcasting services or facilities within the meaning of section 3(o) of the Communications Act of 1934, as amended.

Unmanufactured. With respect to articles, materials, or supplies, refers to such goods that have not been manufactured.

#### § 1787.3 Products constituting a portion of a purchase order or contract.

Where a supplier or contractor offers or furnishes several products under a purchase order or contract, the provisions of this part apply to each product individually.

#### § 1787.4 Unmanufactured articles, materials, and supplies.

The Buy American requirement also applies to unmanufactured articles, materials, and supplies to be financed with RUS loan funds, and will be considered domestic if mined or produced in the United States or in an eligible country.

#### § 1787.5 Eligible countries.

The United State Trade Representative (USTR) determines what countries are eligible countries with respect to purchases made by electric borrowers or telecommunications borrowers. A particular country may be determined to be an eligible country for purchases made by telecommunications borrowers, for electric borrowers, or both. RUS maintains the latest Federal Register notice on its website which sets out the list of Eligible Countries for each RUS program at [https://www.rd.usda.gov/files/UEP\\_Engineering\\_EligibleCountries.pdf](https://www.rd.usda.gov/files/UEP_Engineering_EligibleCountries.pdf).

§ 1787.6 Nondomestic products.

A product is considered to be nondomestic for the purpose of compliance with the “Buy American” requirement if:

- (a) The product is manufactured outside the United States or any eligible country; or
- (b) The product is manufactured in the United States or in any eligible country, but the cost of nondomestic components used therein constitutes 50 percent or more of the cost of all components. The cost of components shall be determined on a comparable basis, so that only the cost of domestic and nondomestic components, up to the point where they are combined and manufactured into a complete product shall be considered.

(1) The determination of the cost of the nondomestic components of a product shall include:

- (i) The price paid to the nondomestic source;
- (ii) The cost of shipment to the port of entry into the United States;
- (iii) Applicable tariffs or duties;
- (iv) The cost of transportation from the port of entry to the distributor’s plant or warehouse; and
- (v) Profit, overhead, and commissions of domestic and nondomestic suppliers and subcontractors of the components.

(2) The following items shall not be considered in determining the cost of components, although they are proper elements in the determination of the final selling price of the product:

- (i) Fabrication or processing costs, if any, of nondomestic or domestic components at the assembly plant, or any other place of fabrication in the United States or any eligible country;

- (ii) Testing costs at the assembly plant or at the installation site;
- (iii) Direct profit, overhead, and commissions of the domestic distributor; and
- (iv) Cost of transportation from the domestic assembly point to the installation site.

#### § 1787.7 Components.

Where a component is manufactured only determines whether the component is classified as domestic or nondomestic even if all the materials and subcomponents comprising the component are manufactured in ineligible countries. A component manufactured in the United States or in an eligible country shall be considered domestic when determining whether a product is classified as domestic or nondomestic. A component manufactured in an ineligible country shall be considered nondomestic.

#### § 1787.8 Purchase of nondomestic products.

An RUS Borrower may only use loan funds to purchase a nondomestic product if a waiver pursuant to § 1787.10 has been received by the Administrator before entering into a contract with the vendor. Should the Administrator deny the waiver request, the RUS Borrower must use its own funds for the expenditure.

#### § 1787.9 Waivers.

Under limited circumstances the Administrator may waive the Buy American requirement with respect to a specific contract entered into between an RUS Borrower and a third party which will be paid for with loan funds, subject to §§ 1787.10 through 1787.14.

#### § 1787.10 Applications for specific waivers.

RUS borrowers may request a specific waiver of the Buy American requirement through a written, detailed explanation showing that:

- (a) The cost between the nondomestic product and domestic product is unreasonable;
- (b) There is a non-availability of domestic products; or
- (c) It is not in the public interest or impractical for the RUS Borrower to purchase a domestic product.

#### § 1787.11 Cost differential.

By application pursuant to § 1787.10, the Administrator may waive the Buy American requirement if the cost of the domestic product is unreasonable. Given that RUS loans terms normally range from 20 to 35 years, and that additional costs will be magnified with interest over these terms, the Administrator has determined that if the lowest bid or offered price is a nondomestic bid that is at least 6percent lower than the next lowest bid or offered price, the RUS Borrower may request a cost differential waiver. With respect to contracts that are not required to be bid, prices of market-available, domestic products must be used for comparison in a request for waiver.

#### § 1787.12 Non-availability or shortages.

By application pursuant to § 1787.10, the Administrator may waive the Buy American requirement upon a showing that there is no domestic product available in the market in sufficient and reasonable quantities and of satisfactory quality, and that such shortage of suitable domestic alternatives jeopardizes the project being completed on budget and/or according to

scheduled planning. A lack of responsive and responsible bids to a well-publicized request for bids will be presumed to meet the conditions of a non-availability waiver. With respect to contracts that are not required to be bid, sufficient evidence must be presented to the Administrator in order to make a determination.

§ 1787.13 Public interest or impracticality.

(a) By application pursuant to § 1787.10, the Administrator may waive the Buy American requirement upon a showing that application of the requirement would be inconsistent with the public interest or impractical for the RUS Borrower. With respect to impracticality, an RUS Borrower may request a waiver upon a showing that the domestic product is incompatible or impractical to integrate with existing, significant capital infrastructure or existing, critical software already in use. Notwithstanding, the burden shall rest with the RUS Borrower to present how the use of the domestic product would create a hardship or negatively impact its project.

(b) With respect to contracts that were approved by RUS based on a bidder or offer that originally certified compliance with the Buy America requirements, but which can no longer comply with such certification, the Administrator may grant an impracticality waiver based on a showing that the original certification was made in good faith and that the product cannot now be obtained domestically due to commercial impossibility or impracticability, or without undue hardship or a negative impact to the project.

(c) In determining whether to issue any public interest waiver, the Administrator will consider all appropriate factors on a case-by-case basis, unless a general waiver has already been issued by the Administrator with respect to the product.

§ 1787.14 General waivers.

(a) The Administrator may issue a general waiver for all RUS Borrowers for a determinate period, if the Administrator finds that such manufactured or unmanufactured goods are in shortage regionally or nationally, so as to avoid the administrative burden of issuing individual, specific waivers.

(b) The Administrator has determined that it is in the best interest of RUS to issue a permanent general public interest waiver from the Buy America requirements for “small purchases,” which shall be published in the *Federal Register* for each program under the RE Act and amended as needed from time to time. In carrying out this exception, however, the Administrator shall ensure that contracts are not artificially fragmented.

**Appendix A to Part 1787 – Product Procurement**

This appendix shows an example of how the 6 percent differential is applied to determine award of a bid. In response to a request for bids for a digital central office a borrower receives four responsive bids to the specification, three domestic bids and one nondomestic bid. The nondomestic bid is the apparent low bid. We will consider in our analysis the nondomestic bid and the lowest domestic bid as shown in the following table.



	NONDOMESTIC BID	DOMESTIC BID
Total materials	\$895,000	\$920,000
Installation	155,000	177,000
Freight	<u>+1,000</u>	<u>+1,500</u>
Total bid	\$1,051,000	\$1,098,500

Please note that once the product has been determined as nondomestic, the 6 percent cost differential shall be applied to all the material content in the nondomestic bid, even if the nondomestic product includes domestic components.

In this example, 6 percent of the total material content in the nondomestic bid (\$895,000) equals \$53,700. This cost differential is added to the total nondomestic bid as shown in the following table.

Total of the nondomestic bid	\$1,051,000
6% of the all material cost	<u>+53,000</u>
Total evaluated bid	\$1,104,700

This total evaluated bid, (that is the nondomestic bid plus the 6% of the cost of its material content), is compared with all the domestic bids for award of the bid. In our example the domestic bid (\$1,098,500) is lower than the nondomestic evaluated bid (\$1,104,700).

The domestic bid becomes the low bid and the domestic bidder gets award of the bid.

This product is classified as domestic since the cost of the domestic components used in the product constitutes more than 50 percent of the cost of all the components used.

Dated: November 6, 2018.

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Christopher A. McLean,

Acting Administrator, Rural Utilities Service.

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